JERRY NGIAM SWEE BENG

v.

ABDUL RAHMAN MOHD RASHID & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES WINDING UP NO: D1-28-850-2000]
27 JUNE 2003

COMPANY LAW: *Winding-up - Liquidator - Whether leave of court required before proceeding against liquidator under s. 277(2) Companies Act 1965*

COMPANY LAW: *Winding-up - Appointment of special manager - Application was supported by liquidator's report instead of affidavit - Whether proper - Companies (Winding-Up) Rules 1972, r. 39(1)*

COMPANY LAW: *Directors - Meetings - Application seeking to validate directors meetings and resolutions - Whether substantial injustice would occur as a result thereof - Whether insufficient notice was given*

The petitioner and the 1st respondent were both directors and shareholders of the 2nd respondent. There was a complete breakdown in relations between them and the petitioner applied to wind-up the 2nd respondent. A winding-up order was given and a liquidator was appointed. The liquidator then appointed the petitioner, with leave of court, as special manager to assist him in running the 2nd respondent. Subsequently, the 1st respondent successfully secured a stay of the winding-up order and took over the administration and management of the 2nd respondent. Thereafter, the petitioner took out a second suit in respect of the 1st respondent's actions after the stay order whilst the 1st respondent took out a third suit seeking to validate the same actions. The second and third suits were subsequently consolidated.

The issues before this court were: (1) whether the 1st respondent's application in encl. 43 on alleged misconduct of the liquidator required leave of court under s. 277(2) of the Companies Act 1965 ('CA'); (2) whether the 1st respondent's application in encl. 54 to set aside the petitioner's appointment as special manager should be allowed on the basis that the said appointment was applied by the petitioner himself and was supported by the liquidator's report instead of an affidavit; (3) whether the 1st respondent's application in the third suit seeking to validate the directors meetings and resolutions would cause substantial injustice to the petitioner; and (4) whether the petitioner's application in the second suit to invalidate the same should be allowed.

Held:

[1] A liquidator having been appointed by the court, is an officer of the court. Therefore, leave of the court is needed before an action is commenced against him and officers like him under s. 277(2) CA. Further, based on ss. 229 and 232 CA, the Official Receiver ('OR') is entrusted with the duty of inquiring into any complaints in respect of the liquidator's performance. Unfortunately, the 1st respondent had neither secured the necessary leave from the court nor sought to proceed against the liquidator through the OR. Hence, his application in encl. 43 should be dismissed. (pp 744 f & 746 b-g)

[2] A perusal of the application to appoint the petitioner as the special manager of the 2nd respondent and the accompanying report clearly showed that the application was at the behest of the liquidator and not the petitioner. Although this was not borne out by the fair order, it was an oversight by both the solicitors drawing up the order and the court approving the same. This mistake could be rectified without prejudice to any of the parties. Also, r. 39(1) of the Companies (Winding-Up) Rules 1972 provides for an application by the liquidator for the appointment of a special manager to be supported by his report. In fact, where a report is filed instead of an affidavit, the report must be treated for the purpose of any hearing before the court as if it were an affidavit (*Halsbury's Law of England* vol 7(3) 4th edn). Therefore, encl. 54 should be dismissed with costs. (p 747 b-f)

[3] The onus is on those seeking to have the directors meetings validated to establish that a substantial injustice would not result to the other directors or shareholders. Further, in relation to validate the resolution on the suspension of the petitioner as director, this court was not clothed with powers to suspend a director. The Companies Act does not make provision for the suspension of directors but for their removal and disqualification in certain circumstances. (p 749 h & 751 c)

[4] There were only two directors and shareholders in the 2nd respondent and both the directors were not in talking terms. The company's substratum to provide professional quantity surveying services had gone and it no longer was able to carry out its main objects. (p 752 e)

[5] There would be substantial prejudice to the petitioner if the court were to validate the directors meetings as the effect would oust the petitioner from the board of the 2nd respondent. Further, there was no proper or reasonable notice of the said meetings served on the petitioner. Similarly, the petitioner's application in the second suit sought to achieve the same end and, if allowed, would cause substantial injustice to the 1st respondent. Therefore, the applications by the petitioner and the 1st respondent in the second and third suits respectively should be dismissed. (pp 753 a, 758 c-d & 759 a-b)

[6] The courts have always been reluctant to interfere in the internal affairs and management of the company. However, in view of the evidently and eminently irreconcilable, profound and violent differences between the petitioner and the 1st respondent, the only just and equitable solution would be to wind-up the company. (p 759 c-d)

[Applications dismissed.]

Case(s) referred to:

Aik Ming Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 CA ***(foll)***
Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeok [1995] 4 CLJ 11 ***(foll)***
Dr Mahesan Subramaniam & Ors v. Ponnusamy & Ors [1994] 3 CLJ 438 HC ***(refd)***
First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1983] MLJ 76 ***(refd)***
Lim Hean Pin v. Thean Seng Co Sdn Bhd &Ors [1992] 2 CLJ 828 HC ***(refd)***
Lloyd-Owen v. Bull [1936] 4 DLR 433 ***(refd)***
Nyuk Fong & Ors v. Pan Global Equities Sdn Bhd [1991] 1 MLJ 152 ***(refd)***
Re Australian Continental Resources Ltd [1974-1976] ACRL 405-430 ***(refd)***
Re Goodwealth Trading Pte Ltd [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822 HC ***(refd)***
Re Perdana Merchant Bankers Bhd [1997] 3 CLJ Supp 140 HC ***(refd)***
TN Metal Industries Sdn Bhd v. Ng Pyak Yeow [1996] 4 MLJ 567 ***(refd)***
Vijayalakshimi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 229, 232(1), 236(1), 277(2), 279, 355(3), 392(2)
Companies (Winding-Up) Rules 1972, r. 39(1)

Other source(s) referred to:

Halsbury's Law of England, vol 7(3), 4th edn 1996, para 2839
Loh Siew Cheong, *Power to Suspend Directors: A New Corporate Weapon Of The Majority,* [1999] 3 MLJ xxxiii

(D1-28-850-2000)
For the petitioner and liquidator - Kenneth Gomes; M/s Sabarudin Othman & Ho
For the 1st respondent - Prasad Abraham (Patricia Paul); M/s Prasad Abraham & Assoc

(D1-24-186-2001)
For the plaintiff - Prasad Abraham (Patricia Paul); M/s Prasad Abraham & Assoc
For the 1st defendant - Kenneth Gomes; M/s Sabarudin Othman & Ho

(D4-24-119-2001)
For the plaintiff - Kenneth Gomes; M/s Sabarudin Othman & Ho
For the 1st defendant - Prasad Abraham (Patricia Paul); M/s Prasad Abraham & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Vincent Ng J:

Preamble

Briefly, the applications pending before me are:

(i) Enclosure 43 in D1(D9)-28-850-00 (the first suit) – En. Abdul Rahman bin Mohamed Rashid's (Abdul Rahman) application for the court to take cognizance of the conduct of the liquidator in the performance of his duties;

(ii) Enclosure 54 in the first suit – Abdul Rahman's application to set aside the order dated 8 March 2001;

(iii) Enclosure 1 in D4-24-119-01 (the second suit) – Mr. Jerry Ngiam Swee Beng's (Jerry Ngiam) application for a series of declaration in respect of Jurukur Bina Sdn Bhd's (Jurukur) Board of Directors' Meetings field on 17 and 20 April 2001 respectively, Jurukur's Extraordinary General meeting held on 3 May 2001, resolutions passed by the said board and to maintain the *status quo* of the Board of Directors and

(iv) Enclosure 1 in D1-24-186-01 (the third suit) – Abdul Rahman's application to validate any irregularities in Jurukur's Annual General Meetings held on 17, 20 & 24 April 2001 respectively.

Background Facts

In order to properly adjudicate upon the various applications before me, it is necessary to review the colourful history of these proceedings in some detail.

Jerry Ngiam and Abdul Rahman are both registered Quantity Surveyors and were sole directors cum shareholders in Jurukur. Abdul Rahman had 60% shareholding with the remaining 40% being held by Jerry Ngiam. Following Abdul Rahman's stroke in 1993, much of the day to day management and administration of Jurukur was handled by Jerry Ngiam.

Sometime in early 1995, Jerry Ngiam set up JASA Ukur Bina, another company in the same field as a prelude to the taking-over of Jurukur. Unfortunately, the setting up of JASA Ukur Bina was used by Abdul Rahman to firstly shut out and eventually oust Jerry Ngiam from Jurukur. Much of Jerry Ngiam's administrative powers were transferred to En. Wan Amin Azharie bin Mahmood. As a result of the complete breakdown in relations between Jerry Ngiam and Abdul Rahman, there was a deadlock in the administration and management of Jurukur.

For these reasons, Jerry Ngiam presented a petition to wind up Jurukur on 4 October 2000. Order in terms was granted on 5 February 2001 and Mr. Anthony Joseph Skelchy (Skelchy) was appointed liquidator of Jurukur. During his brief tenure, Skelchy, with leave of court, appointed Jerry Ngiam as Special Manager to assist him in running Jurukur on 8 March 2001. Abdul Rahman successfully secured a stay of the winding order on 6 April 2001 and once more took over the administration and management of Jurukur.

Soon after, on 27 April 2001, Jerry Ngiam took out the second suit in respect of Abdul Rahman's actions after the stay order. Abdul Rahman commenced the third suit on 9 July 2001, seeking to validate the same actions and also filed encls. 43 and 54 on 24 November 2001 and 11 June 2002 respectively.

It is noteworthy that despite two of the suits being filed at different intervals, they were transferred to Commercial 1. The first suit was assigned to Commercial 1 sometime in June 2001 when Commercial 9 was closed. Upon the application of Jerry Ngiam, a consent order was recorded on 12 June 2002 to consolidate the second and third suits respectively. In order to expedite the hearing of all four applications, the applications were all fixed for hearing on the same day.

Enclosure 43

Abdul Rahman's application was made under s. 277(2) of the Companies Act 1965 (CA 1965) which provides that:

> ... the court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirement or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

Abdul Rahman maintained that Skelchy acted in contravention of s. 236(1) CA 1965 by appointing Kenneth Gomes as solicitor to assist him in the performance of his duties. This is due to the fact that Kenneth Gomes acted for Jerry Ngiam in the winding up proceedings against Jurukur. Further, Abdul Rahman alleged that by causing Jerry Ngiam himself to be appointed as the Special Manager of Jurukur, Skelchy was clearly biased and was not acting independently. Abdul Rahman raised questions as to Skelchy's management of Jurukur's Trust Account and the fact that upon the stay of the winding up order, Skelchy unilaterally handed over the company's assets, records and documents to Jerry Ngiam, instead of the duly constituted Board of Directors.

Skelchy, whilst denying all of Abdul Rahman's allegations, sought to have the application dismissed on the sole ground that Abdul Rahman failed to obtain leave of court before proceeding against him under s. 277(2) CA 1965 and cited the case of *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11 (CA) as authority.

On this question I am completely *ad idem* with Abu Mansor JCA who delivered the judgment of the Court of Appeal. He held that:

> **... it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him. ...**
>
> While we agree that the applicant may proceed against the liquidator, we are, however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding up judge before proceeding against the liquidator and not, as was done here, proceed independently to prevent unnecessary and wastefully litigation. The approach the learned judge should take is as given in the Privy Council case of *Lloyd-Owen v. Bull* ... he has to obtain authority from a judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an

assurance to the sanctioning judge that his action is not vexatious or merely oppressive. The court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. **Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs.** (emphasis added).

(See *Lloyd-Owen v. Bull* [1936] 4 DLR 433, *Vijayalakshimi Devi d/o Nadchatiram v. Dr. Mahadevan s/o Nadchatiram & Ors* [1995] 3 CLJ 493, *TN Metal Industries Sdn Bhd v. Ng Pyak Yeow* [1996] 4 MLJ 567 and *Re Perdana Merchant Bankers Bhd* [1997] 3 CLJ Supp 140.)

Consideration was also had of sub-s. (3) of the same provision in the CA 1965 which is as follows:

The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit.

And, ss. 229 and 232 CA 1965 are expressed thus:

229 Control of unofficial liquidators by Official Receiver

(1) Where in the winding up of a company by the Court a person other than the Official Receiver is the liquidator the Official Receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties, or if any complaint is made to the Official Receiver by any creditor or contributory in regard thereto, the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient.

(2) The Official Receiver may at any time require any such liquidator of a company which is being wound up by the Court to answer any inquiry in relation to any winding up in which he is engaged, and may, if the Official Receiver thinks fit, apply to the Court to examine him or any other person on oath concerning the winding up.

(3) The Official Receiver may also direct a local investigation to be made of the books and vouchers of such liquidator.

232 General provisions as to liquidators

(1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

(2) A provisional liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

Reading s. 232 together with s. 229 CA 1965, it is clear that the official receiver (OR) is entrusted with the duty of inquiring into any complaints in respect of the liquidator's performance. In exercise of this duty, the OR may conduct an inquiry and is also empowered to direct an investigation of the books of the liquidator. It is only after completion of an inquiry and investigation and if the OR thinks fit, does the OR apply to the court to examine the said liquidator concerning the winding up; to take cognizance of his conduct.

And rightly so, because I am of the opinion that a court should not embark on an inquiry of its officer unless there are substantial material before the court to suggest that it would be in the public interest to do so.

Thus, it is clear that in the instant cast, Abdul Rahman, being a contributory, has only two avenues open to him to move against the company, namely either by invoking s. 277(2) or s. 229 read in conjunction with s. 232(1). It is now settled that the court's leave is required to proceed under s. 277(1). Unfortunately, Abdul Rahman has neither secured the necessary leave from the court nor sought to proceed against the liquidator through the OR. This is fatal to his cause in encl. 43.

After much ado, all this court is left with is a scenario of a bitterly contested winding up proceedings and a liquidator barely two months into his tenure, opposing an application for his removal whilst carrying on his usual duties of preparing the necessary reports under the winding up rules. This, without more, I find to be insufficient to move this court to take cognizance of Skelchy's conduct.

For the reasons set out above, I dismiss Abdul Rahman's application in encl. 43 with costs.

Enclosure 54

Abdul Rahman sought to set aside the order dated 8 March 2001, appointing Jerry Ngiam as the Special Manager of Jurukur.

Abdul Rahman's objections to the appointment were twofold:

(i) The order dated 8 March 2001 (encl. 34) reads that the appointment was granted on the application of Jerry Ngiam himself; and

(ii) The application, *via* a summons in chambers, was supported by a report and not an affidavit.

Firstly, a perusal of the application and the accompanying report (encl. 30) clearly set out that the application was at the behest of Skelchy and not Jerry Ngiam. Although this was not borne out by the fair order, it was an oversight, by both the solicitors drawing up the order and the court approving the same. This mistake can and should be rectified without prejudice to any of the parties.

Secondly, r. 39(1) of the Companies (Winding-Up) Rules 1972 provides for an application by the liquidator for the appointment of a special manager to be supported by his report.

Further support can be found in para. 2839 *Halsbury's Law of England*, vol 7(3) 4th edn (1996):

> Use of reports. A report maybe filed in court instead of an affidavit:
>
> (1) in any case, by the official receiver, whether or not he is acting in any capacity mentioned below, or a deputy official receiver; or
>
> (2) unless the application involves other parties or the court otherwise orders, by the administrator, a liquidator, a provisional liquidator, or a special manager.
>
> **In any case where a report is filed instead of an affidavit, the report must be treated for the purpose of any hearing before the court as if it were an affidavit.** ... (emphasis added).

As both the objections were devoid of any merit, I have no difficulty dismissing the application in encl. 54 with costs.

Before moving on to consider the other pending applications, consideration should be had of s. 279 of the CA 1965, which provides the proper mode for addressing any grievances caused by the liquidator.

Enclosures 1 In The Second And Third Suits

Jerry Ngiam filed the second suit seeking a series of declarations to nullify *inter alia* meetings of the Board of Directors, Directors, EGM of Jurukur held on 17, 20 April and 3 May 2001 and resolutions passed therein and for the Registrar of Companies to maintain the *status quo* of Jurukur's Board of Directors. He sought for the following declarations:

(a) A declaration that the Board of Directors Meeting of the 2nd defendant company held on 17 April 2001 and on 20 April 2001 and all other purported Board of Directors Meetings in which there was no proper quorum, and all proceedings therein are unlawful and any or all resolutions or any orders passed or any decisions made therein are unlawful, null and void and of no effect.

(b) A declaration that the purported coming Extraordinary General Meeting of the 2nd defendant be held on 3 May 2001 is improperly convened, unlawful, null and void.

(c) A declaration that all subsequent meetings of the Directors and the resolutions approved thereafter from the Directors Meeting on 17 April 2001 are similarly invalid, null and void and of no effect.

(d) A declaration that the *status quo* of the 2nd defendant's Board of Directors and Shareholders be maintained and the plaintiff be at liberty to apply for rectification of the Register of Directors with the Registrar of Companies.

(e) A declaration that the appointment of Encik Faisal bin Abdullah Rahman as the Company Secretary to the 2nd defendant contrary to the holding of any Directors Meeting and without Board Resolution is unlawful, null and void and of no effect.

Abdul Rahman on the other hand filed the third suit pursuant to s. 355(3) of the CA 1965, seeking to validate all the meetings and resolutions and for an order directing the Registrar of Companies to accept the Form 49, confirming the appointment of En. Wan Amin Azarie as an additional director of Jurukur. This was what he prayed for:

(i) The meetings of the Board of Directors of the 2nd defendant held on 17 April 2001, 20 April 2001 and 26 April 2001 and the resolutions passed therein be declared as valid and proper;

(ii) The Registrar of Companies be directed to accept the filing of Form 49 confirming the appointment of En. Wan Amin Azharie bin Mahmood as the additional Director of the 2nd defendant;

(iii) Such further and/or other relief that this Honourable Court deems fit and proper to award;

(iv) Parties be at liberty to apply.

Both sides made serious allegations and accusations of one trying to oust the other out of Jurukur and run the company exclusively without the consent or knowledge of the other and essentially causing the deadlock in the management.

Section 355 of the CA 1965 sets out that:

(1) No proceedings under this Act shall be invalidated by any defect irregularity or deficiency of notice or time **unless the Court is of the opinion that substantial injustice has been or may be caused thereby which can not be remedied by any order of the court.**

(2) Without affecting the generality of subsection (1) and subsection (2) or any of the other provisions of this Act, **where any omission, defect, error or irregularity** (including the absence of a quorum at any meeting of the company or of the directors) has occurred ... the court:

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify ...

(b) **shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;** ... (emphasis added).

I am guided by *Re Australian Continental Resources Ltd* [1974-1976] ACRL 405-430 wherein the court held that:

> ... the exercise of the discretion ... implies a consideration of the relative gains and losses of the parties involved. Prejudice is not the criterion, justice is and that justice may require that prejudice to one party if the order were made, be balanced against the respective prejudice to other parties if the order were not made.

(See *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1983] MLJ 76, *Re Goodwealth Trading Pte Ltd* [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822, *Nyuk Fong & Ors v. Pan Global Equities Sdn Bhd* [1991] 1 MLJ 152, *Dr Mahesan Subramaniam & Ors v. Ponnusamy & Ors* [1994] 3 CLJ 438 and *Aik Ming Sdn Bhd v. Chang Ching Chuen* [1995] 3 CLJ 639.)

In respect of Abdul Rahman's application (encl. 1) for validation in the third suit No. D1-24-186-01 my rationcination is as follows:

The onus is on those seeking to have the Directors Meetings validated to establish that a substantial injustice would not result to the other directors or shareholders. Under s. 355 the court is given power to make a range of orders of a remedial kind but all are **subject to a finding of the fact** that:

(1) no substantial injustice has been caused or is likely to be caused to any person by the making of the order including that of any member or creditor and even the company itself;

(2) that the irregularity is essentially procedural (steps in the calling of a Director's Meeting is essentially procedural); and

(3) that the order is in the interest of the company.

Therefore, the court would have to come to a finding of fact, on the above-mentioned three grounds or relevant criteria specific in section 355 before giving the order sought which is not remedial but a validation.

The Butterworths Commentary of Australian Cases on section 1322 of what is the meaning of "substantial injustice" is of assistance:

> **Substantial injustice likely to occur.** For an example of a court finding that a substantial injustice is likely to occur see *Donrob Enterprises Pty. Ltd v. Queensland Petroleum Management Ltd* [1988] 14 ACLR 307; 7 ACLC 255 where the court held that a meeting held without a quorum of members was invalid. In *Bell Resources Ltd v. Turnbridge Pty Ltd (No. 2)* [1988] 13 ACLR 762; 6 ACLC 970 it was held that **insufficient notice of resolutions to reduce the number of directors of the company was a substantial injustice** and the voting on the resolutions was declared void. The whole meeting could not be held to be invalid, as notice of the meeting itself had been properly given. See also *Mamouney v. Soliman* [1992] 9 ACSR 63; 10 ACLC 398 in which a special resolution to alter a company's articles as held to be invalid under s. 1322 as the failure of the company to notify a shareholder of the meeting was in the circumstances an irregularity causing substantial injustice. In *Australian Innovation Ltd v. Petrovsky* [1996] 21 ACSR 218, 14 ACLC 1357 Lockhart J invalidated an extraordinary general meeting convened by a company director on the basis that the explanatory note accompanying the notice of the meeting contained several misleading or potentially misleading statements, both the notice and the form of proxy gave an address for the return of proxies not in accordance with the company's articles and, finally, the actions of the company directors in convening the meeting were not *bona fide* in the interests of the company as whole and constituted a breach of his duty of care and diligence under s. 232(4).
>
> Substantive not procedural irregularity. In *Hedges v. NSW Harness Racing Club Ltd* [1991] 5 ACSR 291; 9 ACLC 1025, the court held that an irregularity in the election of directors, which had resulted in the wrong person being declared elected, could not be cured under s. 1322(2) since it was a substantive and not a procedural irregularity.

The plaintiff (Abdul Rahman), in his originating summons, sought to move this court to validate all the resolutions whether they are legal or not without any exception, namely:

Resolution – 17th April 2001

(a) Confirm Encik Wan Amin as a Director as soon as he obtains the registration with the Board of Quantity Surveyor.

(b) Suspension of the Directorship of Mr. Jerry Ngiam with immediate effect.

In my judgment, this court is not clothed with powers to suspend a director. The Companies Act does not make provision for the suspension of directors but for their removal and disqualification in certain circumstances. A suspension would give 'holidays' to directors with respect to their statutory functions and duties under the Act. (See *"Power to Suspend Directors: A new corporate weapon of the majority"* by Loh Siew Cheong reported in [1999] 3 MLJ xxxiii.)

In *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ p. 314 it reads:

One of two directors of a company petitioned to have the company wound up on the ground that it was just and equitable to do so. The company's restaurant business had ceased and the petitioner's relationship with the only other director and shareholder had deteriorated to such a state that they were no longer talking to each other. The other shareholder opposed the petition and at a board meeting of the company, which was attended only by the opposing shareholder, solicitors were appointed to represent the company. The company then, through its solicitors, filed a motion to strike out the petition.

Held, dismissing that motion and allowing the petition.

(1) The appointment of the company's solicitors was irregular, and this irregularity could not be cured by s. 392 of the Companies Act. The section is applicable to save proceedings at a meeting where the lack of a quorum is of little or no consequence, and no shareholder's interests are prejudiced by any decision taken at the meeting. *The provision would not be applicable in the case where it would result in disputed decisions being taken by one of two shareholder groups in a company to the exclusion and possible disadvantage of the remaining shareholder.* The appointment of the company's solicitors was therefore invalid. The firm of solicitors had no *locus standi* to further attend the proceedings and were excused.

(2) The company had ceased to carry on its restaurant business, and consequently the substratum of the company had disappeared. A company's substratum was the main object which it was formed to achieve. If it was no longer able to carry out its main object, its substratum was gone and any member may petition for a winding-up order on the just and equitable ground.

(3) The fact that the majority of shareholders may wish to keep the company in existence, and to exercise the powers to carry on a different kind of business, or even a similar business, will not prevent a dissenting shareholder from petitioning for a winding-up order. This would be so even if the company's memorandum specifically provided that each of its objects should be a principal object, because a court must determine the real object for which the company was formed, and would allow a winding-up petition if the object had to all intents and purposes been abandoned.

(4) In a situation as in the instant (that) case where the company's substratum had disappeared, and there was opposition by the two shareholder groups to continuing in business with the other, it was clearly just and equitable that the company be wound-up, so that the case assets could be distributed and each of the two groups could go his own way.

I agree with counsel for Jerry Ngiam that the decision in *Re Goodwealth (supra)* is on all fours with the present case. There is only two directors and shareholders in Jurukur Bina Sdn Bhd and both the directors are not on talking terms. The company's substratum to provide professional quantity surveying services, has gone, and it is no longer able to carry out its main objects. There is a winding-up order in this case and it was wound up on the just and equitable basis. The judge in *Re Goodwealth* refused to apply s. 392(2), and said, in p. 317:

> Apart from the section, no authority was cited to me of this contention. In my opinion, on a proper construction, s. 392(2) is limited in scope. An irregularity is not cored if 'the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any of the Court. Thus, the provision is clearly applicable to save the proceedings at a meeting where the lack of a quorum is of little or no consequence, and no shareholder's interests are prejudiced by any decision taken at the meeting. *But the provision equally cannot be applicable in a case such as this, in which it will result in disputed decisions being taken by one of only two shareholder groups in a company to the exclusion and possible disadvantage of the remaining shareholder.* In my judgment, therefore the board meeting on 25 October 1989 and the proceedings of the meeting were invalid. Having come to this view, I ruled that the appointment of PK Wong and Advani was also invalid.

Therefore very clearly, in my judgment, Jerry Ngiam's interests were prejudiced by the outcome of the three Directors Meetings, and once the court validates the meetings the effect would be to oust Jerry Ngiam from the board of the second defendant. There will therefore be no doubt, substantial injustice to Jerry Ngiam. The provisions cannot be applicable where the disputed meetings results in decisions being taken that will disadvantage the rights of Jerry Ngiam who is a director and shareholder of the second defendant.

Jerry Ngiam's second point is that it is clear that the validity of all that transpired at the meeting held on 17 April 2001, 20 April 2001 and 26 April 2001 depends on whether proper notice of that meeting had been served on him. There is no dispute that there are only two directors. Notice should be given in the proper manner. He contends that the notices covering the above-mentioned Directors Meetings were defective for being void or insufficient notices, and accordingly the meetings were ineffective and the resolution passed thereat were invalid unless saved by a validation order.

A director or a company secretary could summon a meeting of the Board of Directors, by notice served upon the first defendant. See arts. 93, 94, 95 and 97 of the Articles of Association of the 2nd defendant which states as follows:

> 93. The Directors may meet together for the despatch of business adjourn and otherwise regulate their meetings as they think fit and may determine the quorum necessary for the transaction of business. Until otherwise determines two Directors shall form a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the Chairman shall have a second or casting vote.
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> 94. A Director may at any time and the Secretary upon the request of a Director shall convene a meeting of the Directors.
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> 95. A resolution in writing signed by a majority of the Directors for the time being or their alternates not being less than two Directors shall be as valid and effectual as if it had been passed by a meeting of Directors duly called and constituted. Any such resolution may consist of several documents in like form each signed by one or more directors.
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> 97. A meeting of the directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities powers and discretion by or under the articles of the company for the time being vested in or exercisable by the directors generally.

Notice of the meeting should be served on the director concerned accordingly to the Articles of Association. However, if the Memorandum of Article is silent on the issue (as in the instant case), the court has to examine the previous practice in calling Directors Meetings.

In *Dr. Mahesan Subramaniam & Ors v. Ponnusamy & Ors* [1994] 3 MLJ 312, a case which has been approved by the Court of Appeal, Zakaria Yatim J, held:

> (1) Where the memorandum and articles specify the duration of the notice of directors' meetings, the rule must be strictly complied with. However, where, as in this case, the court has to examine the previous practice in calling directors' meetings. In this case, five days was sufficient notice for the meeting.

On p. 318:

> Mr. C.K. Ong, counsel for the defendants submitted that on the question of the notice of the board meeting dated 14th April 1994, the court had to decide: (a) whether the notice was given to the plaintiffs; (b) if the notice was given to the plaintiffs, whether it provided sufficient time for the plaintiffs to attend the meeting; (c) whether the notice provided details as to the nature of the business to be transacted; and (d) whether a written agenda is necessary in law to be given to the directors. He too cited a number of authorities.
>
> I shall now examine the position in law whether the plaintiffs were given insufficient time to attend the board meeting on 25 April 1994. The memorandum and articles of the company are silent on the issue of notice of meeting of directors. The Companies Act 1965, too is silent on this point. It is therefore necessary to examine the position at common law. According to RR Pennington, *Company Law* (6th Ed) at page 575:
>
> > Notice of board meetings should be given to all the directors in sufficient time to enable them to attend. What is sufficient notice depends on the facts at the time ...

On p. 320:

> From the cases cited above, it is clear that where a few hours' notice is given for a board meeting and two of the directors are not able to attend the meeting due to the short notice, or where no notice is given because the director is abroad, a meeting held pursuant to the notice is void. But if the directors who receive the short notice of meeting make no objections to the short notice or meeting make no objections to the short notice or make no request that the meeting be adjourned to another date, such meeting is valid. Where the notice of meeting does not reach the directors because they are abroad, the meeting is only an irregularity, which can be set right at any moment. In order to determine whether sufficient notice is given to directors, the court has to examine the previous practice of the board of directors in calling the meeting. In *Homer*'s case [1888] 39 Ch D 546, the few hours notice has never been previously given in the history of the company.

> Where the memorandum and articles expressly specify the duration of the notice of meeting of the board of directors, the board must strictly comply with that rule. Non-compliance with that rule will render the meeting ineffective and the resolutions passed at the meeting invalid. See *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1983] 2 MLJ 76.

Jerry Ngiam further contends that this is not a case where insufficient notice of a meeting was given but it is a case where no notice whatsoever was given. He has categorically stated in para. 53, he stated that he did not receive any notice of that meeting dated 17 April 2001 nor for the meeting to be held on 20 April 2001. Although a notice was faxed to his office on 16 April 2001 at 4.16pm he contends that that was not a reasonable notice and that all three meetings are related to each other and are therefore invalid. And, it is not a case of a mere irregularity but of a nullity, considering his contention that no notice whatsoever was given. The notice as per the agenda prays for:

(i) confirmation of a new director (1st meeting);

(ii) suspension or removal of Jerry Ngiam as a director (1st meeting);

(iii) confirmation of the minutes (2nd meeting);

(iv) withdrawal of signatory right to 1st defendant (3rd meeting);

(v) only two signatures for bank accounts plaintiff and Wan Amin (3rd meeting).

Power is given to validate such irregularities. However if this is not a case of an irregularity but of a nullity, s. 355 looks to the justice of a particular case, it is not concerned with the question of whether prejudice would result. Since the meetings are void there is no irregularity to be cured.

The decision of *Aik Ming Sdn Bhd v. Chang Ching Chuen* [1995] MLJ p. 772 is illuminating, and which I would adopt in the instant case:

> (3) Unless the articles of a company provide to the contrary, a meeting of a board of directors is *not valid unless reasonable notice of it and the relevant agenda that is to be discussed is given to the directors. In this case, no notice of the meeting was given. It was thus a nullity and all the business conducted was utterly void.* It could not be considered a mere irregularity which could be cured because at the date of the meeting, the plaintiffs not only had a majority of voting power on the board but also on the floor of any general meeting that might have been convened.

(5) As the business conducted at the subsequent meetings of the company's board were dependent for their validity upon the propriety of the meeting which had failed to stand up to curial scrutiny, those later meetings were also void.

On p. 801:

I now turn to consider the more formidable argument that the defendants' failure to give notice did not have the effect of invalidating the board meeting. In support of her argument, Cik Kannaperan cited two decisions, namely, *Bently Stevens v. Jones* [1974] 2 All ER 653; [1974] 1 WLR 638, and *Dr. Mahesan & Ors v. Ponnusamy & Ors* [1994] 3 MLJ 312.

On p. 804:

How can it ever be said that a director's removal at a meeting of which notice to him is withheld is a mere irregularity? When the question is put in this way, it seems clear to me that the proposition contended for falls so short of our own standards and concepts of corporate fairness, that I find it entirely unacceptable. However, I am relieved to realise that I need not place myself on a collision course with Lindley LJ, since all that one needs to do is to recognise that relief to Browne was principally denied at an interlocutory level on the ground that his conduct amounted to an acquiescence of the wrong done to him.

I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid, unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors. *Young v. Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223 is authority for that proposition. In that case, it was held that, 'where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting, and accordingly the omission to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body.

On p. 806:

Given the finding of fact by the learned judge that the notice convening the meeting of 17 April 1990 was not served on the plaintiffs – a finding that I accept as being entirely proper – and having regard to the true principle of law that is to be applied, I am satisfied that the conclusion reached by the learned judge, namely, that the meeting and all the business conducted thereat were utterly void, is correct. It follows that the submission by counsel on this point is unacceptable. The business conducted at the subsequent meetings of

the first defendant's board are dependent for their validity upon the propriety of the meeting of 17 April 1990. That meeting having failed to stand up to curial scrutiny, these later meetings are also void and useless, and the learned judge was right in so holding.

On p. 810:

Now it is clear that the section looks to the justice of a particular case: it is not concerned with the question whether prejudice would result in the making of a validation order. (See *Re Australian Continental Resources Ltd* [1975] 1 ACLR 405.) Where the justice of the instant case lay and how discretion should be exercised is a matter eminently within the province of the learned judge. For it must not be forgotten that the section vests the original discretion in the High Court and that the initial function of this court is one of review only. An appellant therefore must therefore demonstrate that a judge has committed one or more of those errors which permits the Court of Appeal to exercise a discretion of its own. Having regard to the findings of fact the judge made, and having regard to the way in which he approached the determination as to where the justice of the case lay, I am convinced that the defendants have failed to discharge this onus.

Also see *Nyuk Fong & Ors v. Pan Global Equities Sdn Bhd* [1991] 1 MLJ 152.

In *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828, Edgar Joseph J (as he was then) made the following observations, in potent language, on a member's right to vote:

The right to vote is one of a member's fundamental rights. Excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression of the minority, which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat. In the circumstances, there could be no recourse to the validation provisions of either s. 355(12) or s. 355(3) of the Act. The word 'proceedings' in s. 355(1) of the Act should not be confined solely to legal proceedings but should extend to all proceedings at company meetings provided that they are required to be held under the Act.

And, in his judgment (at p. 842) he further said:

However, in respect of any omission, defect or irregularity in the management or administration of a company in contravention of the Companies Act 1965 s. 355(3) therefore is manifestly clear and empowers the court, in certain circumstances, on its own motion or on application, to make a validation order provided no injustice is done to the company or to any member or creditor thereof. The next question which arises is whether wrongfully excluding the

> proxy and thus preventing the plaintiff from exercising his statutory right to vote conferred under s. 148(1) of the Companies Act 1965 was a mere omission, error or an irregularity capable of being cured under s. 355(1) or s. 355(3). (See *Nyuk Fung & Ors v. Pan Global Equities Bhd* where the principles for the applicability of s. 355(3) are discussed.) In my view, excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression on the minority which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat.

In the present case before me, I am satisfied that no proper or reasonable notice of the three Directors Meetings had been served on Jerry Ngiam and they were therefore null and void, I would further hold that the notice sent by fax to Jerry Ngiam at 4.16pm on 16 April 2001 (a day before 17 April meeting) could not constitute reasonable or normal notice.

Thus, I would hold that to allow validation at this stage would certainly do grave and substantial injustice to Jerry Ngiam and the 2nd defendant.

In *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd* [1983] MLJ p. 78 it was held:

> In *Re Australia Continental Resources Ltd.*, it has been said that the exercise of discretion provided in section 366(3) (Australian), implies a consideration of the relative gains or losses of the parties involved. Prejudice is not the criterion, justice is, and that justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.

The affidavits have substantially gone into the background of this matter. The parties are exclusively partners in the business, *albeit* Abdul Rahman is infirmed. It is not denied that Abdul Rahman has ousted Jerry Ngiam from the business. He has attempted to bring in a new director, Wan Amin, who was originally not a partner to this business. Wan Amin for all practical purposes has now taken over the business. Looking at the background you cannot say that a majority of the partners has been used to further oust Jerry Ngiam as a director of the company. Further this validation is only an afterthought. The Registrar of Companies pursuant to the earlier AGM or EGM has rejected Abdul Rahman's attempts to push through the earlier motions passed, hence one of the prayers of the plaintiff is for the ROC to accept the appointment of Encik Wan Amin.

Similarly, Jerry Ngiam, *vide* encl. 1 in D4-24-119-01, sought to achieve the same end, the control over Jurukur, through some variation of the unfair and unconscionable methods that he himself had complained against Abdul Rahman. In my judgment to allow this encl. 1 would, on similar grounds as advanced by Jerry Ngiam above, and bearing in mind the principles enunciated by the authorities above, cause substantial injustice to Abdul Rahman. Indeed, in view of the dismissal of Abdul Rahman's application in the third suit a large part of Jerry Ngiam's application in D4-24-119-01 has become academic.

The position adopted by the courts in this convoluted area of company law has always been one of reluctance to interfere in the internal affairs and management of the company. More so, taking into account that the considerable dispute in the winding up proceedings is presently subject to two pending appeals in the Court of Appeal, the decision whereof would finally put to rest the current fight between these two protagonists. One of the petition for winding-up is grounded on 'the just and equitable' basis. In view of the evidently and eminently irreconcilable, profound and violent differences between these two protagonists, perhaps the only just and equitable solution would be to wind-up the company.

In light of all above circumstances, I find that it would be oppressive and prejudicial to allow one application whilst dismissing the other. I therefore dismiss both Jerry Ngiam's and Abdul Rahman's applications in the second and third suit respectively, with costs.